(5)

Supreme Court, U.S.
FILED
MAY 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK MATHEWS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR PETITIONER

FRANKLYN M. GIMBEL*
(Appointed by this Court)
JEFFREY A. KAUFMAN
MARNA M. TESS-MATTNER
GIMBEL, REILLY, GUERIN & BROWN
Suite 930, One Plaza East
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
Telephone: 414/271-1440
Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED FOR REVIEW

May a criminal defendant use the entrapment defense when he admits committing all of the acts constituting the offense charged but denies possessing the requisite criminal intent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
CITATIONS TO OPINIONS IN COURTS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
THE FIFTH AMENDMENT PROHIBITS COMPELLING A CRIMINAL DEFENDANT TO ADMIT ANY OF THE ELEMENTS OF THE OFFENSE	9
A. This Court's Decisions Clearly Allow A Defendant To Use The Entrapment Defense When He Admits The Acts But Denies The Criminal Intent, As Did Mathews In The Instant Case	9
B. In Addition To Conflicting With This Court's Holdings, The Seventh Circuit's Insistence That Mathews Concede His Guilt Before He Can Claim Entrapment Violates Mathews' Constitutional Rights Under The Fifth Amendment	12
C. The Conflict In The Circuits Results In Differing Applications Of The Entrapment Defense From Circuit To Circuit	16
CONCLUSION	24

TABLE OF AUTHORITIES

CASES

Page

Crisp v. *United States*, 262 F.2d 68 (4th Cir. 1958) 21
Eastman v. *United States*, 212 F.2d 320 (9th Cir. 1954)..... 12, 20
Griffin v. *United States*, 380 U.S. 609 (1965) 14
Hampton v. *United States*, 425 U.S. 484 (1976)..... 10
Hansford v. *United States*, 303 F.2d 219 (D.C. Cir. 1962) (*en banc*) 17
Kinsella v. *United States ex rel. Singleton*, 361 U.S. 234 (1960) 10
Munroe v. *United States*, 424 F.2d 243 (10th Cir. 1970) (*en banc*)..... 22
Ortega v. *United States*, 348 F.2d 874 (9th Cir. 1965) ... 12
Sherman v. *United States*, 356 U.S. 369 (1958).... 9, 10, 11
Simmons v. *United States*, 390 U.S. 377 (1968)..... 14
Sorrells v. *United States*, 287 U.S. 435 (1932) 9, 10, 11, 12, 21
Ware v. *United States*, 259 F.2d 442 (8th Cir. 1958)..... 16
United States v. *Annese*, 631 F.2d 1041 (1st Cir. 1980) 15, 18
United States v. *Barrios*, 457 F.2d 680 (9th Cir. 1972) .. 22
United States v. *Caron*, 588 F.2d 851 (1st Cir. 1978).... 18
United States v. *Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*)..... 10, 13, 15, 19, 20, 21
United States v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986)..... 20, 21, 22
United States v. *Eastman*, 212 F.2d 370 (9th Cir. 1954)..... 12, 20
United States v. *Hendricks*, 456 F.2d 167 (9th Cir. 1972) 22
United States v. *Henry*, 749 F.2d 203 (5th Cir. 1984) (*en banc*)..... 15, 17
United States v. *Hill*, 655 F.2d 512 (3d Cir. 1981).. 10, 20, 22
United States v. *Johnston*, 426 F.2d 112 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971)..... 12
United States v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984).. 16, 17
United States v. *Liparota*, 735 F.2d 1044 (7th Cir. 1984) 13
United States v. *Mathews*, 803 F.2d 325 (7th Cir. 1986) 1, 10, 12
United States v. *Mitchell*, 514 F.2d 758 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975) 22
United States v. *Mora*, 768 F.2d 1197 (10th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 856 (1986)..... 10, 20

Table of Authorities Continued

Page

United States v. *Nicosia*, 638 F.2d 970 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981) 13, 20

United States v. *Prickett*, 790 F.2d 35 (6th Cir. 1986) 10, 20, 22

United States v. *Rivera*, 778 F.2d 591 (10th Cir. 1985) .. 22

United States v. *Rodgers*, 755 F.2d 533 (7th Cir. 1985) 12, 13, 20

United States v. *Roviaro*, 379 F.2d 911 (7th Cir. 1967) .. 20

United States v. *Russell*, 411 U.S. 423 (1973) 9, 10, 11

United States v. *Silvestri*, 719 F.2d 577 (2d Cir. 1983) ... 18

United States v. *Smith*, 757 F.2d 1161 (11th Cir. 1985) .. 19

United States v. *Valencia*, 645 F.2d 1158 (2d Cir. 1980) . 18

United States v. *Walker*, 720 F.2d 1527 (11th Cir. 1983), *cert. denied*, 465 U.S. 108 (1984) 19

United States v. *Watson*, 489 F.2d 504 (3d Cir. 1973) 22

Constitution and Statutes

U.S. Const. amend. V 2

18 U.S.C. § 201(g) 1, 8

18 U.S.C. § 3231 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 8

Law Review Articles

Cronin, *The Law of Entrapment in Massachusetts and the First Circuit*, 14 Suffolk U.L. Rev. 1203 (1980). 18

Groot, *The Serpent Beguiled Me and I (Without Scienter) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. Ill. L.F. 254 13

Nagle, *Inconsistent Defenses in Criminal Cases*, 92 Mil. L. Rev. 77 (1981) 19, 20, 23

Note, *Pleading the Entrapment Defense: The Propriety of Inconsistency*, 28 N.Y.L. Sch. L. Rev. 1025 (1983) 10, 14, 16, 18, 19, 20

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is *United States* v. *Matthews*, 803 F.2d 325 (7th Cir. 1986) (J.A. 132). That citation includes the denial of petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc*. 803 F.2d at 325. (J.A. 147).

The United States District Court for the Eastern District of Wisconsin did not issue a written decision on the entrapment defense. The transcripts of its oral decisions on the issue are included in the Joint Appendix. (J.A. 2, 131).

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Seventh Circuit affirming the judgment below was entered on October 9, 1986. The order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered October 29, 1986. The Petition for Writ of Certiorari was filed December 27, 1986 and was granted March 30, 1987. This court has jurisdiction pursuant to Title 28 of the United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner was convicted of violating Title 18 of the United States Code, section 201(g), which provides as follows:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for

> or because of any official act performed or to be performed by him;
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

The fifth amendment to the United States Constitution provides in relevant part as follows:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The Small Business Administration ("SBA") is an agency of the United States. (R.37:124). Its purpose is to assist small businesses with financing, business advice, and obtaining government contracts. (R.37:124).

Petitioner Frederick Mathews ("Mathews") was employed in the Milwaukee SBA office as a Business Development Specialist. (J.A. 10; R.37:124-25). His job was to facilitate the 8A Program, which is designed to encourage small businesses owned by socially and economically disadvantaged small business concerns. (R.37:124-25).

Midwest Knitting Mills, Inc. was, at all times material to this case, a qualified small business eligible for participation in the 8A Program. (J.A. 8; R.37:125). James DeShazer ("DeShazer") was its owner and operator. (J.A. 6). At some time prior to November or December of 1984, Midwest Knitting Mills arranged with the SBA to receive advance payments to enable it to perform on various contracts. (J.A. 12-13).

Prior to 1979, DeShazer knew Mathews on a social basis. (J.A. 9). DeShazer and Mathews had lunches and evening drinks together, played the lottery together, and shared discussions of personal and family matters. (J.A. 106, 117-18). Mathews was a quiet man, a loner who kept to himself and considered DeShazer a friend as well as a business acquaintance, particularly in light of the confidences they shared. (J.A. 117-18; R.38:434-35). DeShazer also considered Mathews a personal friend. (J.A. 101). At one point in 1983 Mathews asked for and received from DeShazer a loan in the amount of $1,500.00 to assist in paying his daughter's college expenses. (J.A. 16-17, 93). DeShazer told the FBI and a business associate named Ken Little that Mathews emphasized that it was a personal loan and that the request was entirely personal. (J.A. 101-02).

In November of 1984, Mathews was relieved of full responsibility for the Midwest Knitting Mills File. (J.A. 113, 119-20; R.38:450, 456). At the same time, in November or December of 1984, Midwest Knitting Mills began having problems getting its advance payments through the SBA to facilitate its purchase of raw materials to perform its government contracts. (J.A. 23-24).

During that time, DeShazer also started "getting a lot of heat" from the United States Navy's purchasing agent about fulfillment on certain contracts. (J.A. 95). It was during this November-December time period that DeShazer began to blame Mathews for his business woes. (J.A. 23-25). He told the Navy's agent that he suspected that Mathews was not processing the documents, and said that Mathews kept asking him for money. (J.A. 23-24, 95-96). In November of 1984, on his own initiative, DeShazer began to tape record his conversations with Mathews. (J.A. 96). None of these tapes were preserved

or submitted to the government, because, according to DeShazer, they were all erased or unintelligible. (J.A. 29, 96). DeShazer's reasoning for suspecting Mathews was as follows:

> Q. You put two and two together back, you say, in June of 1984; that you believed that the advance payments were somehow tied to Mr. Mathews' request for money that you talked about, right?
>
> A. That's correct.
>
> Q. And what you thought then that was that Mr. Mathews was not going to—was going to tell you he was not going to do anything until he gets the money, right?
>
> A. That's correct.
>
> Q. But what Mr. Mathews had told you was that he had done everything, right?
>
> A. He told me that, sure.
>
> Q. So you assumed that Mr. Mathews was lying to you and expected you to see through that lie and realize that he was holding you up for money.
>
> A. That is the way I took it.

(J.A. 54-55).

At trial DeShazer admitted that in fact Mathews had not requested any loans since July of 1984. (J.A. 20). In addition, DeShazer accused Mathews, in the summer of 1984, of failing to process his documents because of DeShazer's failure to grant Mathews' earlier personal loan request. (J.A. 90). DeShazer stated that Mathews vehemently denied this. (J.A. 90, 112). Through the Navy purchasing agent, the Department of Defense then referred the matter to the FBI for investigation in January, 1985. (J.A. 23-26).

In approximately January of 1985, after DeShazer had voiced his suspicions to the Navy agent, the FBI contacted DeShazer regarding his allegations that Mathews was soliciting loans from him, and asked DeShazer to assist in an investigation of Mathews. (J.A. 25). After an initial interview wherein DeShazer told the FBI that "Mathews continues to ask for money" and "has called him as many as five to six times in a single day with [requests for loans]," DeShazer agreed to tape-record conversations with Mathews if the FBI would supply him with equipment. (J.A. 25-26).

On or about February 22, 1985, Mathews was informed by his superior at the SBA that his employment would be terminated within the next month or so. (J.A. 119-21). Mathews told DeShazer and other clients about his impending termination. (J.A. 121-22).

On or about February 28, 1985, DeShazer and Mathews met socially at a restaurant. (J.A. 29, 121). During that meeting, DeShazer told Mathews that he had arranged a loan of approximately $12,000.00, that he had the money in cash in his garage, that he needed only $7,000.00 of it, that he did not want his wife to find out about the extra cash, and that he would loan $4,200.00 to Mathews. (J.A. 29-31, 99-100, 121-23). Mathews was interested in the loan because he was financially strapped due to his impending termination, his separation from his wife, and the resultant increased living expenses. (J.A. 121-23).

Over the next several weeks, DeShazer tape recorded a number of conversations between DeShazer and Mathews. (J.A. 68-69). DeShazer did not tape record all of the conversations. (J.A. 68-69). Mathews testified that after the late February meeting, he decided to accept the money as a personal loan if DeShazer was sincere about offering it. (J.A. 123-26).

DeShazer testified that all tape recorded telephone conversations he had with Mathews involved discussions of the loan payment. (J.A. 68-69). By way of impeachment, however, the parties stipulated at trial that in all of the tape recorded conversations during the two months between February 28, 1985 and April 23, 1985, the subject of the loan came up only once, on April 8. (J.A. 107).

On April 8, 1985, DeShazer called Mathews and asked Mathews to meet him after work. (J.A. 23, 35-36, 123). DeShazer gave Mathews a ride to the service station that was repairing Mathews' car. (J.A. 36-37, 123-24). On the way there, DeShazer again offered to loan the money to Mathews, and they arranged a meeting during which he would give the loan money to Mathews. (J.A. 38-39, 125). Mathews did not keep that appointment. (J.A. 125-26).

In the two and one-half weeks between April 8 and April 23, the loan did not come up again until, in a telephone conversation on April 23, 1985, the night before their final meeting, DeShazer asked Mathews if he was still interested in the loan and suggested that Mathews might not get any of it because DeShazer might spend it himself. (J.A. 68, 125). This conversation began with Mathews calling to tell DeShazer that a meeting at his bank, scheduled for the next day, had been cancelled. (J.A. 67). After telling DeShazer this, Mathews made the salutary comment, "well, I will see you in the morning then, . . . well, I will see you tomorrow anyway . . . ." (J.A. 67). At this point DeShazer brought up the loan again, stating, "you ain't said nothing to me in the last week on this other thing," and "Ain't going to be nothing there for you to get," and "The devil tempts me, you know what I mean?" (J.A. 67, 69). Mathews then agreed to meet DeShazer the next day for lunch. (J.A. 125).

The next morning, April 24, 1985, DeShazer went to the SBA and talked to Mathews. (J.A. 98-99). Mathews told DeShazer that he couldn't meet him for lunch, but that he would call later to arrange a meeting. (J.A. 99). At 11:00 a.m. on the 24th, DeShazer called Mathews to tell him that he was meeting an IRS employee to get some documents regarding a payment plan for delinquent taxes. (J.A. 99). DeShazer also told Mathews in this conversation that he was getting very nervous with that money in his garage and that he wanted to get rid of it to avoid a second divorce, which DeShazer said might occur should his wife learn about the money in the garage. (J.A. 99). Mathews promised to call DeShazer later. (J.A. 100). DeShazer then called Mathews to confirm a 1:30 p.m. meeting. (J.A. 100). Without confirming the meeting, Mathews told DeShazer he would call back. (J.A. 100). At 1:30 DeShazer called Mathews again, telling him that he had the IRS document and that if Mathews wanted it, he would be at the Greenery Restaurant. (J.A. 64-65, 100-01). Mathews then agreed to meet DeShazer at the restaurant. (J.A. 65).

During the meeting at the Greenery, Mathews first inquired about the IRS letter. (J.A. 65, 127). The conversation then turned to the processing of advance payments. This conversation was prompted by DeShazer's questioning. (J.A. 47-48, 127). Mathews explained, as he had previously, that everything was in order and had been processed. (J.A. 127). Because DeShazer seemed upset, Mathews "let him rant and rave on," although he was in a hurry and thinking of other matters. (J.A. 127). DeShazer then said he had the loan money there, and Mathews accepted it. (J.A. 48-49, 126). DeShazer suggested that they leave the restaurant separately, but Mathews said they could leave together. (J.A. 49, 65-66). Mathews was arrested as he left the hotel. (R. 37:398).

Mathews was charged with receipt of money as an employee of the SBA, in violation of Title 18 of the United States Code, section 201(g). (R.5). The United States District Court for the Eastern District of Wisconsin had original jurisdiction pursuant to Title 18 of the United States Code, section 3231.

Mathews filed a motion in limine seeking to use the entrapment defense. (R.21, 22, 23). The trial court orally denied that motion. (J.A. 2). At the close of trial, Mathews moved for a mistrial based upon the entrapment issue, but the trial court denied that motion as well. (J.A. 131).

On August 19, 1985, the jury found Mathews guilty of receipt of money by an employee of the SBA for or because of an official act, in violation of Title 18 of the United States Code, section 201(g). (R. 28). The trial court suspended imposition of sentence on October 16, 1985 and placed Mathews on probation for three years, with a special condition of house arrest for two years. (R. 30).

Following the entry of judgment on October 18, 1985, Mathews filed a timely notice of appeal. (R.31). The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to Title 28 of the United States Code, section 1291.

SUMMARY OF ARGUMENT

The Seventh Circuit Court of Appeals' requirement that a defendant who wishes to claim entrapment must first admit that he committed the offense violates that defendant's Fifth Amendment rights by compelling him to incriminate himself before he can assert that the government induced him to commit the offense. There is no inconsistency in allowing a defendant to require the government to prove that he committed the offense, while

claiming that he was entrapped into doing so. Whether the defendant was predisposed to commit the offense, and therefore was not entrapped, is a jury question. The entrapment defense should have been submitted to the jury because Mathews' denial of criminal intent was not inconsistent with his claim of entrapment.

ARGUMENT

THE FIFTH AMENDMENT PROHIBITS COMPELLING A CRIMINAL DEFENDANT TO ADMIT ANY OF THE ELEMENTS OF THE OFFENSE.

A. This Court's Decisions Clearly Allow A Defendant To Use The Entrapment Defense When He Admits The Acts But Denies The Criminal Intent, As Did Mathews In The Instant Case.

The entrapment defense is premised upon "the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). Nothing in this Court's history of the defense, however, requires a defendant to *admit* that he committed all the elements of a prescribed offense before he may claim that he was induced to commit them by the government, as the Seventh Circuit Court of Appeals required Mathews to do in the instant case. On the contrary, *Sorrells* v. *United States*, 287 U.S. 435, 452 (1932), expressly permits a defendant to plead not guilty and assert the entrapment defense. *See Sherman* v. *United States*, 356 U.S. 373 (1958)

The defense does not have a constitutional basis, although the possibility exists that in a particular case the law enforcement conduct in question may violate "that 'fundamental fairness, shocking to the universal sense of

justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-32 (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)). *See* Note, *Pleading the Entrapment Defense: The Properiety of Inconsistency*, 28 N.Y.L. Sch. L. Rev. 1025, 1033 n.53 (1983).

Though the defense has no constitutional basis, constitutional implications nevertheless arise when, as in the instant case, courts restrict the use of the entrapment defense to cases where the defendant admits all elements of the crime charged, including *mens rea*. *See United States* v. *Mathews*, 803 F.2d 325, 327 (7th Cir. 1986); *United States* v. *Prickett*, 790 F.2d 35, 36 (6th Cir. 1986); *United States* v. *Mora*, 768 F.2d 1197, 1198-99 (10th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 856 (1986); *United States* v. *Hill*, 655 F.2d 512, 514 (3d Cir. 1981) Requiring a defendant to admit guilt before he may claim the defense infringes upon the defendant's constitutional right to require the government to prove each and every element of its case beyond a reasonable doubt. *E.g.*, *United States* v. *Demma*, 523 F.2d 981, 986 (9th Cir. 1975) (*en banc*). In effect, he must incriminate himself before he can assert the defense.

Over the past fifty-five years, this Court has focused upon "the intent or predisposition of the defendant to commit the crime." *Russell*, 411 U.S. at 429. *See also Hampton* v. *United States*, 425 U.S. 484, 488-89 (1976); *Sherman* v. *United States*, 356 U.S. at 372; *Sorrells* v. *United States*, 287 U.S. at 442 (1932). As now-Chief Justice Rehnquist noted in *Russell*, "[i]t is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *Russell*, 411 U.S. at 436. In determining whether a particular defendant was pre-

disposed to commit the offense charged, the crucial question is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells*, 287 U.S. at 451. *See also Sherman*, 356 U.S. at 372.

In the instant case, Mathews fully admitted that he accepted money from DeShazer, but denied having the intent to accept the money as a gratuity. He further asserted that he was entrapped into accepting the money. Thus, he admitted doing all of the acts constituting the offense, but denied having the *mens rea* necessary to convert otherwise innocent conduct into a criminal offense.

Most of the evidence of intent, that is, that Mathews accepted the money for or because of official acts, came from DeShazer's statements during the taped conversations where DeShazer's business was discussed in the same conversation as discussions of the loan. Mathews denied ever making the link in his own mind between the loan and his official acts on DeShazer's behalf. Thus the evidence was consistent with both a denial of the intent element and a claim that the government's agent, DeShazer, created the crime by his own inducements. On that basis, Mathews was entitled to the entrapment defense. Denying Mathews the use of the entrapment defense in those circumstances effectively precluded him from using an entire theory of defense which was wholly consistent with his admission of the *acts* involved while denying that he had the criminal intent.

This case is before the Court on writ of certiorari to the United States Court of Appeals for the Seventh Circuit. In its decision below, the Seventh Circuit reiterated and

clarified its longstanding rule that a defendant who pleads entrapment must admit that he committed all of the physical acts and had the necessary criminal intent, before he may assert that the government implanted the criminal design in his mind. *Mathews*, 803 F.2d at 327. (J.A. 134-35). *See, e.g., United States* v. *Rodgers*, 755 F.2d 533, 550 (7th Cir. 1985); *United States* v. *Johnston*, 426 F.2d 112, 114 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). The Seventh Circuit found Mathews' entrapment defense "inconsistent *per se* with the defense that the defendant never had the requisite criminal intent." *United States* v. *Mathews*, 803 F.2d at 327. (J.A. 135).

The Seventh Circuit's current position directly conflicts with the Supreme Court's view that there is no inconsistency in joining an entrapment plea with a not guilty plea. *Sorrells*, 287 U.S. at 452. Certainly if a defendant simply pleads not guilty, he is not admitting even as much as Mathews did. Under *Sorrells* and its progeny, as well as under the fifth amendment's protections, the Seventh Circuit's rule requires the defendant to relinquish a constitutional right as a condition precedent to use of the entrapment defense. This case therefore should be reversed and remanded for a new trial.

B. In Addition To Conflicting With This Court's Holdings, The Seventh Circuit's Insistence That Mathews Concede His Guilt Before He Can Claim Entrapment Violates Mathews' Constitutional Rights Under The Fifth Amendment.

The Seventh Circuit's rule compelling defendants to admit their guilt before they may claim entrapment is founded upon *Ortega* v. *United States*, 348 F.2d 874 (9th Cir. 1965), a Ninth Circuit case which relied upon *Eastman* v. *United States*, 212 F.2d 320 (9th Cir. 1954). The Ninth Circuit has since overruled *Eastman* and its pro-

geny. *United States* v. *Demma*, 523 F.2d at 982. As part of the Ninth Circuit's analysis and criticism of the *Eastman* rule, the court summarized the constitutional problems with the rule as follows:

> Continued adherence to *Eastman* would have generated serious constitutional problems by conditioning the assertion of a defense on the defendant's yielding his presumption of innocence, his right to remain silent, and his right to have the Government prove the elements of the crime beyond a reasonable doubt.
>
> As long as the *Eastman* "rule" lives, this circuit will be in conflict with *Sorrells*, *Sherman*, and *Russell;* our internal law will be in disarray; and the constitutional issues will hover. No sound reason exists to perpetuate the *Eastman* aberration.

Demma, 523 F.2d at 986 (footnote omitted) (citing Groot, *The Serpent Beguiled Me and I (Without Scienter) Did Eat—Denial Of Crime and the Entrapment Defense*, 1973 U. Ill. L.F. 254, 269-75). Although the *Demma* court declined to base its decision on constitutional grounds, it noted that its "restatement of entrapment law in the circuit avoids the constitutional problems that lurked in the *Eastman* line of cases . . . ." *Demma*, 523 F.2d at 986.

In the twelve years since the Ninth Circuit overruled *Eastman*, however, the Seventh Circuit has persisted in relying upon *Eastman* progeny as authority for its rule that a defendant must admit all elements of the crime, including *mens rea*, before he may claim the entrapment defense. *E.g.*, *United States* v. *Rodgers*, 755 F.2d at 550; *United States* v. *Liparota*, 735 F.2d 1044, 1048 (7th Cir. 1984); *United States* v. *Nicosia*, 638 F.2d 970, 972-73 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). The Seventh

Circuit has undertaken no new analysis of its position, but simply continues to cite the "rule."

As a consequence of the Seventh Circuit's rule, Mathews must elect between denying his guilt while forgoing the entrapment defense, or pursuing the entrapment defense while conceding his guilt. To claim entrapment, he is forced to forfeit his fifth amendment right to remain silent and not incriminate himself, and his due process right to require the government to prove the crime charged beyond a reasonable doubt.

In *Simmons* v. *United States*, 390 U.S. 377 (1968), this Court dealt with the "intolerable" situation of a defendant having to surrender a constitutional right in order to assert another. *Id.* at 393-94. That case involved a defendant's need to incriminate himself by admitting ownership of incriminating evidence in order to obtain standing to challenge an illegal search. Although the entrapment defense does not yet rise to the level of a constitutional right, the *Simmons* holding nevertheless can be applied to the fifth amendment protections that Mathews had to sacrifice in order to claim the entrapment defense. Indeed, ". . . *Simmons* may be read as forbidding a forced trade-off of protection, even if one right is not constitutionally grounded, as long as that right remains fundamentally important." Note, *supra* p. 10, at 1072.

Mathews should not be precluded from asserting the entrapment defense solely because he exercises his fifth amendment and due process rights. In *Griffin* v. *United States*, 380 U.S. 609 (1965), this Court prohibited prosecutors from commenting upon defendants' failure to testify, thereby penalizing defendants who exercised their right to remain silent. The exercise of a constitutional right should not be costly to a defendant. *Id.* at 614. Thus,

penalizing a defendant who exercises his fifth amendment and due process rights by precluding him from exercising the important right to present all reasonable defenses is impermissible.

The oft-discussed concerns about inconsistent defenses and about predisposition are not at issue in this case. Even if they were, they would pale in light of the constitutional implications of denying a criminal defendant use of a defense unless he first incriminates himself by admitting that he committed a crime. "Whether the defendant had the criminal intent required for conviction is a jury issue. Whether he was predisposed to commit the charged crime . . . is also a jury issue." *United States* v. *Henry*, 749 F.2d 203, 213 (5th Cir. 1984) (*en banc*).

Mathews should be allowed to present both his lack of intent and his lack of predisposition to the jury and allow the jury to decide the issues. The consistency or inconsistency of particular defenses are a factor for the jury to consider in assessing the defendant's credibility. As the *Demma* court noted, "[i]nconsistent testimony by the defendant seriously impairs and potentially destroys his credibility." *Demma*, 523 F.2d at 985. Conversely, a defendant who elects not to testify may reduce his chances of success in persuading a jury that he was entrapped, but "that is a choice that he has a right to make free of any compulsion whatsoever." *United States* v. *Annese*, 631 F.2d 1041, 1047 (1st Cir. 1980).

Contrary to the suggestion in *Demma*, under the facts of this case the two defenses would not have been inconsistent, and the credibility of Mathews' overall defense would have been strengthened. Defense counsel could have acknowledged during closing argument that DeShazer's comments linking the loan and Mathews' official duties

were strong evidence of intent. Counsel could have further strongly argued that this intent was the creation of DeShazer and the government, entirely consistent with a classic entrapment defense. The jury could thus have consistently elected either ground for a verdict of acquittal.

C. The Conflict In The Circuits Results In Differing Applications Of The Entrapment Defense From Circuit To Circuit.

The circuits are sharply divided on whether a defendant can claim entrapment while denying scienter. As a consequence, a federal defendant in Milwaukee, such as Mathews, is treated differently from a similarly-charged defendant in Los Angeles or Dallas with regard to his ability to claim entrapment while exercising his constitutional rights. Two circuits allow a defendant to deny all elements of the crime, including physical acts and intent, and still claim entrapment. Four circuits allow the entrapment defense where, as in the instant case, the defendant admits committing the acts charged but denies possessing the requisite *mens rea*. Five circuits now require the defendant to admit all elements, including intent. One circuit requires the defendant to admit the acts involved in the offense, but has never clearly addressed the intent issue. *Ware* v. *United States*, 259 F.2d 442, 445 (8th Cir. 1958). *See* Note, *supra* p. 10, at 1063.

A defendant in the District of Columbia may deny intent but still claim entrapment. In *United States* v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984), an ABSCAM case, the District of Columbia Circuit Court of Appeals held that the entrapment instruction was properly given where the defendant testified that he took a bribe, but

claimed he did so to further an investigation and therefore lacked the necessary criminal intent. *Id.* at 696, 701 n.24. In its leading case on the entrapment issue, however, the District of Columbia Circuit did not require the defendant to admit any elements of the offense charged, and allowed the defendant to use "alternative but not inconsistent" defenses. *Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (*en banc*). The *Hansford* court held that "[i]t was consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment." *Id. See Kelly*, 748 F.2d at 701 n.24.

If a defendant in the Fifth Circuit admits the acts charged but presents evidence negating his criminal intent, he is entitled to an entrapment instruction. *United States* v. *Henry*, 749 F.2d 203, 205-06 (5th Cir. 1984) (*en banc*). As did Mathews, the defendant in that case testified and admitted the acts but denied possessing the requisite scienter. *Id.* at 206. The Fifth Circuit concluded that "a *non-testifying* defendant may—by examination of witnesses and argument—contest every element of the charged offense and still request and obtain an entrapment instruction." *Id.* at 210 (emphasis in original). When the defendant testifies, however, the same rule applies because it "is entirely consistent with the nature of the jury function and with the nature of the entrapment defense to require the jury to consider both the existence and the quality of the defendant's alleged intent." *Id.* at 211. The Fifth Circuit took the approach that the accused is not guilty if he was not predisposed to commit the crime, rather than the approach that he is guilty of the crime but can avoid punishment because the government entrapped him. *Id.* at 210. In so doing, the Fifth Circuit aligned itself with this Court's long line of cases cited earlier.

The fate of a defendant in the First Circuit is not quite as clear due to some earlier confusion arising from a footnote in *United States* v. *Caron*, 588 F.2d 851, 852 n.4 (1st Cir. 1978). That footnote commented that "the issue of entrapment does not arise until a defendant admits commission of the crime charged but asserts that the offense was instigated by the actions of the law-enforcement officers." *Id.* On the basis of that footnote, the First Circuit was characterized as requiring the defendant to admit all elements, including intent, before the entrapment defense would be available. Note, *supra* p. 10, at 1050 n.146; Cronin, *The Law of Entrapment in Massachusetts and the First Circuit*, 14 Suffolk U.L. Rev. 1203, 1234-35 (1980). In *United States* v. *Annese*, 631 F.2d 1041 (1st Cir. 1980), however, the court held that a testifying defendant must admit the acts, need not admit his guilt as to the offense, but cannot actually deny his guilt. *Id.* at 1046. In holding that a non-testifying defendant may claim the entrapment defense, the court held that the defendant must choose whether to testify "free of any compulsion whatsoever. To hold otherwise would raise a serious fifth amendment problem." *Id.* at 1047.

In a slightly different approach, the Second Circuit Court of Appeals allows a defendant to claim entrapment while contending that his acts did not violate the law, as long as he does not take the stand. *United States* v. *Silvestri*, 719 F.2d 577, 580 n.1 (2d Cir. 1983). He need not admit the allegedly criminal acts as long as he does not deny them. *United States* v. *Valencia*, 645 F.2d 1158 (2d Cir. 1980).

Generally, a defendant in the Eleventh Circuit may not use the entrapment defense if it conflicts with another defense theory, although certain exceptions exist. An entrapment defense is allowed in conjunction with a not

guilty plea as long as the defenses are not so inconsistent as to confuse the jury. *United States* v. *Walker*, 720 F.2d 1527, 1534 (11th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984). As long as such seemingly inconsistent defenses are not "impermissibly inconsistent"—that is, they do not disprove each other—they are allowed. *United States* v. *Smith*, 757 F.2d 1161, 1168-69 (11th Cir. 1985).

A defendant in the Ninth Circuit enjoys the broadest range of defense opportunities with regard to this issue. In *United States* v. *Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*), the Ninth Circuit Court of Appeals developed what are still the strongest arguments in favor of the "permissive" approach to the entrapment debate. *See* Note, *supra* p. 10, at 1051-54, 1065; Nagle, *Inconsistent Defenses in Criminal Cases*, 92 Mil. L. Rev. 77, 106-09 (1981). *Demma* permits a defendant to deny committing any element of the crime, including intent, and yet claim entrapment. *Id.* at 983. Both defendants in *Demma* testified that they did the acts, but denied that they possessed the scienter necessary to convert their conduct into criminal activity. *Id.* at 982. Basing its rationale upon *Sorrells*, the *Demma* court held that "[t]he requirement that the defendant concede a state of mind is in direct conflict with the *Sorrells* conception of entrapment." *Demma*, 523 F.2d at 983. Thus, the Ninth Circuit permits totally inconsistent defenses on the premise that a defendant's assertion of entrapment while he simultaneously denies committing the acts constituting the offense simply raises a credibility question for the jury. *Id.* at 985.

At the opposite end of the entrapment spectrum are the Third, Fourth, Sixth, Seventh and Tenth Circuits, which require the defendant to admit every element of the offense, including *mens rea*, before he can claim that he was entrapped. Prior to *Demma*, the Ninth Circuit was

also included in that group. *United States* v. *Eastman*, 212 F.2d 370 (9th Cir. 1954).

Of that group, as indicated earlier, the Seventh Circuit Court of Appeals is the strongest advocate of the so-called "inconsistency rule" prohibiting use of the entrapment defense in conjunction with a denial of any element of the offense. *See, e.g.*, Note, *supra* p. 10, at 1047-48 and n.134; Nagle, *supra* p. 19, at 114. That circuit's position, however, is founded upon *Ortega*, a progeny of *Eastman*, which was expressly overruled in *Demma*. *Demma*, 523 F.2d at 982; *United States* v. *Roviaro*, 379 F.2d 911, 914 (7th Cir. 1967). *See United States* v. *Nicosia*, 638 F.2d 970, 977-78 (7th Cir. 1980) (Swygert, J., dissenting), *cert. denied*, 452 U.S. 961 (1981). Although the Seventh Circuit has been tempted to reconsider its rule, it has consistently adhered to the *Eastman*-based rule. *United States* v. *Rodgers*, 755 F.2d at 550; *Nicosia*, 638 F.2d at 972-73.

In recent cases, the Third, Sixth and Tenth Circuits also have generally followed the rule that requires defendants to admit all elements of the crime charged before they may claim entrapment. *United States* v. *Prickett*, 790 F.2d 35, 36 (6th Cir. 1986); *United States* v. *Mora*, 768 F.2d 1197, 1198-99 (10th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 856 (1986); *United States* v. *Hill*, 655 F.2d 512, 514 (3d Cir. 1981).

The most recent convert to the "inconsistency rule" group is the Fourth Circuit Court of Appeals. For nearly thirty years, until *United States* v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986), the Fourth Circuit's position on the entrapment issue was the same as the Ninth Circuit's current *Demma* rule: the defendant was allowed to assert totally inconsistent defenses, including claiming entrapment, without conceding that he committed the

crime or any of its elements. *Crisp* v. *United States*, 262 F.2d 68, 70 (4th Cir. 1958). In *Dorta*, however, the Fourth Circuit rejected *Crisp's* reasoning and held that the defendant must concede that he committed the crime in question before he can claim that he was entrapped into doing so. *Dorta*, 783 F.2d at 1181-82. But the precise issue before this Court was not addressed. It is not clear whether a defendant in the Fourth Circuit can admit only the acts and still avail himself of the entrapment defense.

Perhaps the easiest explanation for the diverse holdings in the various circuits is that a number of circuits have mistakenly relied upon the concurring opinion in *Sorrells*. In his concurrence in *Sorrells*, Justice Roberts noted that a defendant who commits a crime, albeit due to government inducement, is within the letter of the law proscribing the criminal conduct and is therefore "amenable to its penalties." *Sorrells*, 287 U.S. at 456 (Roberts, J., concurring). According to Justice Roberts the entrapment defense does not excuse the criminal conduct or somehow render the statute in question inapplicable to that defendant. *Id.* at 455-56. Nor does it entitle the defendant to "a double defense under his plea of not guilty, namely, (a) that what he did does not fall within the definition of the statute, and (b) entrapment." *Id.* at 456.

The *Sorrells* majority, however, expressly considered and rejected the government's contention that the entrapment defense was not available to a defendant who pleads not guilty. *Id.* at 452. Thus, from *Sorrells* forward, this Court has allowed defendants to plead not guilty and still claim the entrapment defense. As the Ninth Circuit noted, "the requirement that the defendant concede a state of mind is in direct conflict with the *Sorrells* conception of entrapment." *Demma*, 523 F.2d at 983. On that basis alone, the district court's refusal to allow Mathews

to claim entrapment is contrary to the law of the land, and reversal is mandated.

In addition, all of the circuits continuing to require the defendant to admit the crime, including *mens rea*, have simply continued to rely upon *Eastman* and its progeny, despite the Ninth Circuit's *Demma* decision overruling *Eastman*. For example, the Third Circuit's most recent pronouncement simply states the "rule" without comment, citing an earlier circuit case. *Hill*, 655 F.2d at 514 (citing *United States* v. *Watson*, 489 F.2d 504, 507 (3d Cir. 1973)). That case relied upon the Ninth Circuit case of *United States* v. *Hendricks*, 456 F.2d 167, 169 (9th Cir. 1972), which is a descendant of *Eastman*.

Similarly, in *United States* v. *Prickett*, 790 F.2d at 36, the Sixth Circuit recently reiterated its reliance upon *United States* v. *Mitchell*, 514 F.2d 758, 761 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975), for the same rule. The *Mitchell* court relied upon *United States* v. *Barrios*, 457 F.2d 680 (9th Cir. 1972), which traces its roots to *Ortega* and thence to *Eastman*.

The Tenth Circuit also cites "well-settled" law in the circuit that the defendant must admit the crime to use the entrapment defense. *United States* v. *Rivera*, 778 F.2d 591, 598 (10th Cir. 1985) (citing *Munroe* v. *United States*, 424 F.2d 243, 244 (10th Cir. 1970) (*en banc*). The *Munroe* holding to that effect is based upon *Ortega*.

The Fourth Circuit relies upon virtually all of the cases just discussed. *United States* v. *Dorta*, 783 F.2d at 1181. Of the circuits discussed above, however, the issue of inconsistency when a defendant admits the acts but not the intent has not been specifically addressed in the Third and Fourth Circuits.

Thus, the five circuits still refusing to allow a defendant to claim entrapment unless he admits all elements of the offense are simply perpetuating the theoretically and constitutionally infirm *Eastman* principles which were soundly rejected in *Demma*. Although some of the cases address concerns with predisposition determinations and analyses of whether a given set of defenses is impermissibly inconsistent, their original fundamental basis remains *Eastman*.

Six years ago, one commentator expressed great concern about the "serious split among the circuits . . . on a fundamental right of any defendant—the right to present evidence." Nagle, *supra* p. 19, at 125. He concluded:

> It is a fundamental flaw in the American system of justice if an individual arrested in San Francisco in the Ninth Circuit can assert entrapment while still putting the Government to its proof, while a defendant arrested in Chicago in the Seventh Circuit for the same offense or even as part of the same conspiracy can assert entrapment only at the expense of his constitutional rights. Such a dichotomy cries out for correction.

Id.

CONCLUSION

Frederick Mathews respectfully urges this Court to reverse his conviction and grant him a new trial with the ability to claim the entrapment defense without forfeiting his constitutional rights to remain silent, to refrain from incriminating himself, and to require the government to prove every element of the offense charged beyond a reasonable doubt. In so doing, this Court will eliminate a longstanding dichotomy in the circuits while reiterating and clarifying its well-established holdings on the entrapment defense.

Respectfully submitted,

GIMBEL, REILLY, GUERIN & BROWN
FRANKLYN M. GIMBEL
(Counsel of Record)
(Appointed by This Court)
JEFFREY A. KAUFMAN
MARNA M. TESS-MATTNER
Attorneys for Petitioner
FREDERICK MATHEWS
POST OFFICE ADDRESS:
Suite 930, One Plaza East
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
414/271-1440